

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 03 March 2004

BALCA Case No.: 2003-INA-9
ETA Case No.: P2001-NY-02470356

In the Matter of:

DELION DELICATESSEN & GROCERY,
Employer,

on behalf of

VICENTE CARREON,
Alien.

Appearances: Peter E. Torres, Esquire
New York, New York
For Employer and the Alien

Certifying Officer: Dolores Dehaan
New York, New York

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for alien labor certification filed by Delion Delicatessen and Grocery ("Employer") on behalf of Vicente Carreon ("the Alien") for the position of Specialty Cook, Italian.¹ The Certifying Officer ("CO") denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26.

¹ Permanent alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On January 13, 1998, Employer filed an application for labor certification on behalf of the Alien for the position of Specialty Cook, Italian. (AF 16). The position entailed forty hours of basic time and thirty-two hours of overtime per week. Two years of experience in the job offered were required.

The CO issued a Notice of Findings (“NOF”) on June 4, 2002, proposing to deny certification because while the position was listed as Specialty Cook, Italian cuisine, Employer’s business was a deli and grocery. (AF 43-45). The CO pointed out that Employer’s menu listed standard deli/grocery items with only four handwritten Italian items. The CO determined that Employer had failed to adequately establish the need for a cook whose duties were limited solely to cooking Italian cuisine; Employer had also failed to demonstrate that a permanent, full-time position could be guaranteed for the position as described. The CO also found the requirement of a seventy-two hour work week to be unduly restrictive in violation of 20 C.F.R. § 656.21(b)(2). Employer was advised that it needed to justify the requirement as a business necessity or delete the requirement and re-advertise. (AF 43-44).

Employer submitted rebuttal on July 2, 2002. (AF 47). Employer explained that the store was open twenty-four hours a day, seven days a week. In 1992, Employer started offering buffet meals, including Italian dishes. At the time, the Alien was employed as a cashier and was promoted to specialty cook in 1993-1994 due to an increase in food sales. Employer asserted that it rarely updated the menu because it prepared foods at customer request and Italian foods which were not on the menu. Employer stated that the hours the Alien worked arose from business necessity because of the hours of operation. (AF 47).

On July 23, 2002, the CO issued a Final Determination (“FD”) denying certification. (AF 48-49). The CO found that Employer had failed to demonstrate that a bona fide, permanent, full-time opportunity existed for a Specialty Cook whose duties

were limited to preparing and cooking Italian dishes in its deli/grocery store. Employer had indicated that Italian meals were incorporated in 1992, approximately two years subsequent to the hiring of the Alien. However, Employer was required to document that a major change in his business operation caused the job to be created after the Alien was hired. Nothing in the rebuttal demonstrated that the inclusion of Italian dishes came about as a result of any change in Employer's business operation. The CO also pointed out that if the position required seventy-two hours per week, it would appear that Employer needed to hire two workers to fill the position. The requirement that one individual work a seventy-two hour week remained unduly restrictive and the CO found that Employer failed to adequately demonstrate that the requirement arose from business necessity. (AF 48).

On August 22, 2002, Employer requested review and the matter was docketed in this Office on October 16, 2002. (AF 59).

DISCUSSION

Twenty C.F.R. § 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. An employer cannot use requirements that are not normal for the occupation or are not included in the Dictionary of Occupational Titles ("DOT") unless it establishes a business necessity for the requirement. The purpose of 20 C.F.R. § 656.21(b)(2) is to ensure that the job opportunity is available to qualified U.S. workers. *Rajwinder Kaur Mann*, 1995-INA-328 (Feb. 6, 1997).

An employer can establish business necessity by showing that (1) the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and (2) the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer. *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989)(*en banc*).

Unsupported conclusions are insufficient to demonstrate that the job requirements are supported by business necessity. *Alfa Travel*, 1995-INA-163 (Mar. 4, 1997). In order to demonstrate business necessity an employer must show factual support or a compelling explanation. *ERF, Inc.*, 1989-INA-105 (Feb. 14, 1990). A letter merely stating that the items listed in ETA 750 are "critical" without supportive documentation is insufficient. *Princeton Information Ltd.*, 1994-INA-57 (July 5, 1995).

In this case, Employer claimed that it needed an employee who would work seventy-two hours per week. Employer failed to provide specific documentation or a compelling explanation sufficient to establish that the requirement was indeed essential to perform the job. Employer's rebuttal was limited to a statement that the deli is open around the clock. This did not provide sufficient information to establish business necessity. As the CO correctly pointed out, it would appear that if seventy-two hours per week is required, then two employees would be needed to fill this position. The fact that the deli is open twenty-four hours a day does not mean that one employee must work the majority of those hours.

Employer failed to establish business necessity for the requirement that one employee work seventy-two hours per week and the requirement was determined to be unduly restrictive. Labor certification was properly denied and the remaining issues need not be addressed.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.